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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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11 JONI BAKER, aka F. JOAN BAKER,
12 Plaintiffs,
13 vs.
14 TARGET CORPORATION, *et al.*,
15 Defendants.

NO. C 07-04998 BZ

PLAINTIFF'S REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO REMAND ACTION

Hearing Date: December 5, 2007
Time: 10:00 a.m.
Courtroom: G
Magistrate Judge: Hon. Bernard Zimmerman

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18 I. Defendant's Allegation that Plaintiff's Interrogatory Responses were Deficient
Does Not Negate the Fact That Defendant Was Able To Ascertain on August
23, 2007 that this Case Was Removable.

21 Though Defendant alleges that plaintiff's responses to discovery were incomplete,
22 defendant cannot dispute that sufficient information was provided to defendant in
23 plaintiff's responses to interrogatories "from which it may first be ascertained that the
24 case is one which is or has become removable." 28 U.S.C. § 1446(b). Defendant does
25 not deny that from those interrogatory responses, defendant can ascertain that plaintiff had
26 aggravated a preexisting C-5-C6 herniated disc in her neck and had undergone surgery to
27 her neck. (Decl. of A. Yee, Exhibit A, interrogatory no. 6.2, page 3 and Exhibit B,

1 response no. 6.2, page 2) Defendant was also able to ascertain that plaintiff continued to
 2 have neck pain and that plaintiff's physician has recommended a second operation on her
 3 neck. (Decl. of A.Yee, Exhibit A, interrogatory no. 6.3, page 4 and Exhibit B, response
 4 no. 6.3, page 3) Defendant was also able to ascertain that plaintiff's wage loss included
 5 two weeks off beginning April 21, 2005 and then part time until her surgery in July 2005
 6 and that she did not work from the date of surgery in July 2005 until her return to work
 7 part time in June 2006, almost one year later. (Decl. of A. Yee, Exhibit A, interrogatory
 8 no. 8.5 – 8.6, page 4 and Exhibit B, response no. 8.5.-8.6, page 4) Defendant was also
 9 able to ascertain that plaintiff claimed her wage loss was based on an income loss of
 10 \$1,446.92 per week. (Decl. of A. Yee, Exhibit A, interrogatory no. 8.7, page 4 and
 11 Exhibit B, response no. 8.7, page 4). This resulted in a wage loss which exceeded
 12 \$75,000.00. The fact that there were deficiencies in responses to other interrogatory
 13 questions, such as how plaintiff's monthly income is calculated, or that there was
 14 incomplete information concerning the plaintiff's full damage claim such as all medical
 15 expense resulting from the incident, did not prevent defendant from ascertaining that the
 16 case was removable.

17 Similarly, the fact the verification to the interrogatories were provided later did not
 18 prevent defendant from ascertaining from the document that the amount in controversy
 19 exceeded \$75,000.00. Under the plain language of 28 U.S.C. §1446(b), *any paper* that is
 20 served or otherwise which comes to the defendant's attention, and shows the matter may
 21 be removable, begins the running of the thirty days. *Addo v. Globe Life & Accident Ins.*
 22 *Co.* (5th Cir. 2000) 230 F.3d 759, 761-62. 28 U.S.C. §1446(b) is not limited to papers
 23 filed in the litigation. The reference to "other paper" in the statute includes pre-removal
 24 correspondence between the parties, including settlement offers. A post-complaint letter
 25 constitutes "other papers" within the meaning of the removal statute and is consistent with
 26 the purpose of the removal statute to encourage prompt resort to federal court when a
 27 defendant first learns that the plaintiff's demand exceeds the federal jurisdictional limit.
 28 *Id.* at 762. Thus, even a settlement letter is sufficient to provide notice that the amount in

1 controversy exceeded the jurisdictional amount. See *Cohn v. Petsmart, Inc.* (9th Cir.
 2 2002) 281 F.3d 837.840.

3 Here, plaintiff's interrogatory responses, whether or not deficient procedurally or
 4 somehow incomplete, did not negate the fact that defendant was able to ascertain on
 5 August 23, 2007, that the grounds for removal existed.

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7 **II. Federal Law, Not State Law, Defines the Procedure for The Federal Removal**
Statue and As a Result, Defendant's Notice of Removal Was Untimely.

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9 If the original complaint was not removable, defendant had thirty days after receipt
 10 "through service or otherwise of a copy of an amended pleading, motion, order or other
 11 paper form which it may first ascertain that the case is one which is or has become
 12 removable." 28 U.S.C. §1446(b) Defendant argues that, because the interrogatory
 13 responses were served by mail, it is entitled to an extension of 5 days within which to file
 14 its notice of removal under California Code of Civil Procedure §1013(a). Thus, defendant
 15 contends that removal was timely because it was made thirty-five days after mailing of the
 16 interrogatory responses. This argument however has been rejected by the Courts,
 17 including this court. Although state law determines when service is made, federal law
 18 defines the procedure for the federal removal statute. See *Chicago, Rock Island & Pacific*
 19 *R.R. v. Stude* (1954) 346, U.S. 574. The time limits in 28 U.S.C. §1446 must be strictly
 20 construed in accordance with the computation principle in Federal Rule of Civil Procedure
 21 Rule 6. *Student A v. Metcho* (N.D. Cal 1989) 710 F.Supp. 267, 268-269; *Owens v.*
 22 *General Dynamics Corp.* (S.D. Cal. 1988) 686 F.Supp. 827, 829. Federal Rule of Civil
 23 Procedure Rule 6(e) provides that [w]henever a party has the right or is required to do
 24 some act or take some proceedings within a prescribed period after the service of a notice
 25 or other paper upon the party and the notice or paper is served upon the party by mail, 3
 26 days shall be added to the prescribed period. The time began to run upon deposit of the
 27 interrogatory responses in the mail on August 23, 2007 when, under state law, service was
 28

1 complete. Cal.Civ.Proc.Code §1013(a). Therefore, the thirty-three day period expired on
2 September 25, 2007, two days before defendant filed its notice of removal.

III. Conclusion

The defendant, as the removing party, bears the burden of establishing the right to removal. The removal statutes are to be strictly construed, and all doubts about federal jurisdiction must be resolved in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets* (1941) 313 U.S. 100, 108-109; *Duncan v. Stuetzle* (9th Cir. 1996) 76 F.3d 1480, 1485; *In re Business Men's Assur. Co.*, (8th Cir. 1993) 992 F.2d 181, 183. Here, defendant has failed to show that the notice of removal was timely filed as required by 28 U.S.C. §1446(b). The action must therefore be remanded to the Superior Court of the State of California for the County of Alameda.

Dated: November 14, 2007 SIEGEL & YEE

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By /S/
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